_TATE OF CALIFORNIA

PETE WILSON, Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
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H. THOMAS CADELL, JR., *Chief Counsel*

April 27, 1992

Arthur Chinski
Buchalter, Nemer, Fields & Younger
601 South Figueroa Street
Suite 2500
Los Angeles, CA 90017-5704

Re: **Calculation Of Regular Rate Of Pay**

Dear Mr. Chinski:

Your letter of February 10, 1992, to Victoria Bradshaw, State Labor Commissioner regarding the above-referenced subject has been referred to this office for reply. Please be advised that after reviewing your letter, the DLSE has chosen to reevaluate its enforcement position in regard to the calculation of the regular rate of pay when more than one hourly wage has been paid in any one calendar day.

As you and I have discussed in the past, the current policy has been in effect since approximately February, 1984. The current enforcement policy was a result of adoption of Interpretive Bulletin 84-6 which deals with payment for travel time. The policy notes that the employer may "establish a different rate of pay for travel beyond the normal work day." The Interpretive Bulletin also provides that in the event "total compensable travel time exceeds eight hours in one day" the applicable premium must be paid. In order to put this policy into effect, the Division adopted a policy which provided that the regular rate of pay which was in effect at the time the overtime began was the rate upon which the premium was to be based. That policy was, as you pointed out, at odds with the announced policy contained in the 1978 Operations and Procedures Manual. Additionally, there does not appear to be any authority in the IWC Orders (such as that found at 29 U.S.C. 207(g)(2)) for adopting such a policy. The newest Operations and Procedures Manual does not refer to this problem at all.

It is not a situation which arises often and, for that reason, has not presented itself as a problem. After review, the Labor Commissioner has decided that the DLSE should revert to the pre-1984 policy which <u>nearly</u> mirrors the federal method for calculating the regular rate of pay where two or more different hourly rates have been paid for performing different kinds of work. The state requirements are as follows:

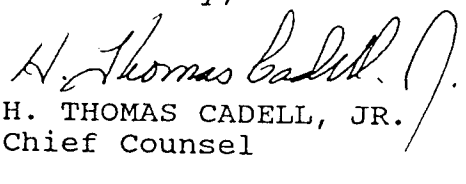
As with the federal requirements, different rates may be paid for different jobs so long as the work involved is objectively different. Also, such "nonproductive" time as that spent traveling may be paid at a different rate. However, since the IWC Orders do not contain the language of Section 207(g)(2) of the Fair Labor Standards Act, there would be no authority under California law which would allow the employee and employer to enter into an agreement which would provide that the premium rate of the different work would be based upon the rate paid for that work during non-overtime hours. The premium rate for either travel time or different work must be based on the *weighted average* of all of the rates paid in that day.

This method of calculating the regular rate had been in effect for many years, was known and understood by the members of the Commission and, obviously ratified by the IWC since they made no objection. The *weighted average* method of calculation is, therefore, clearly consistent with the intent of the IWC and is certainly more consistent with the federal method than the "rate in effect" method in use by the DLSE since 1984. The employer operating both inside California and throughout the United States will not encounter near as much difficulty in understanding and implementing the policy outlined above because of its similarity to the established federal method.

The state enforcement will, unlike the federal method, be based upon the daily weighted average. This is necessary in order to correctly determine the overtime due on a daily basis as required by California law.

I hope this adequately responds to the concerns you raised in your letter of February 10, 1992. The Division will take the appropriate steps to announce this change in enforcement policy and advise our staff.

Yours truly,



H. THOMAS CADELL, JR.
Chief Counsel

c.c. Victoria Bradshaw
James Curry
Simon Reyes